MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

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KERRIE EVANS and JOE EVANS, Plaintiffs, vs. LIVINGSTON HEALTHCARE, d/b/a PARK CLINIC; PEGGY SCANSON, CNP; BOZEMAN OB/GYN – BILLINGS CLINIC; WILLIAM PETERS, MD; BOZEMAN DEACONESS HOSPITAL; and SHODAIR CHILDREN'S HOSPITAL – DEPARTMENT OF MEDICAL GENETICS, Defendants.	Cause No. DV-11-990B **DECISION AND ORDER RE: PARK CLINIC AND SCANSON'S MOTION TO DISMISS**

On December 19, 2011, Defendants Livingston HealthCare, d/b/a Park Clinic ("Park Clinic"), and Peggy Scanson, CNP ("Scanson") filed a Motion to Dismiss and Brief in Support. On January 3, 2012, Plaintiffs Kerrie Evans ("Kerrie") and Joe Evans ("Joe") filed an Answer Brief in opposition to Park Clinic and Scanson's Motion to Dismiss. On January 17, 2012, Park Clinic and Scanson filed a Reply Brief in support of their Motion to Dismiss. On January 20, 2012, Kerrie and Joe filed Objections to Park Clinic and Scanson's Reply Brief. On February 2, 2012, Park Clinic and Scanson filed a Response to Kerrie and Joe's Objections. From reviewing the briefs and filings of counsel, the Court is fully advised.

BACKGROUND

The following facts are taken from Kerrie and Joe's Complaint and deemed admitted for the limited purpose of deciding Park Clinic and Scanson's Motion to Dismiss. *Stillman v. Fergus County*, 220 Mont. 315, 316, 715 P.2d 43, 43 (1986) ("In deciding a motion to dismiss . . . [a]ll well-pleaded allegations [in the complaint] are deemed admitted.").

Cystic fibrosis is the most common fatal genetic disorder and the second most common disorder diagnosed by Montana's mandatory newborn screening. Compl. ¶¶ 14-15 (Oct. 21, 2011). Cystic fibrosis is an incurable, fatal, disease. Compl. ¶ 16. Cystic fibrosis is the most common autosomal recessive genetic disorder in Caucasian populations. Compl. ¶ 17. Caucasians have the highest risk of being carriers of cystic fibrosis. Compl. ¶ 18. Kerrie and Joe are Caucasian. Compl. ¶ 18.

A blood test, known as "carrier testing," can determine whether an individual is a carrier of cystic fibrosis. Compl. ¶¶ 19-20. Carrier testing has been available for well over a decade. Compl. ¶ 20. The applicable standard of care requires carrier testing to be offered to Caucasians seeking prenatal care, such as Kerrie and Joe. Compl. ¶ 21. The applicable standard of care also requires informed consent concerning carrier testing since:

> (1) In 1997, the National Institutes of Health Consensus Development Conference on Genetic Testing for Cystic Fibrosis recommended that [carrier testing] be offered to Caucasian couples seeking prenatal care.
>
> (2) Over nine years ago, a joint statement was made by the American College of Obstetrics and Gynecology ("ACOG") and the American College of Medical Genetics ("ACMG") that stated that [carrier testing] should be offered to couples in whom one or both partners are Caucasian and are either planning a pregnancy or seeking prenatal care;
>
> (3) In 2005, ACOG further recommended that, because Caucasians such as Kerrie and Joe [have] the highest rates of [cystic fibrosis] carriers, and

> the most accurate test results, [carrier testing] should be offered early in the pregnancy.

Compl. ¶ 22.

Although carrier testing identifies only the potential risk of having a child with cystic fibrosis, chorionic villus sampling ("CVS") can test the tissue of the fetus and determine whether the fetus has cystic fibrosis. Compl. ¶ 23. CVS cannot cure cystic fibrosis *in vitro*. Compl. ¶ 24. CVS simply provides a pregnant woman and her family with information they can use to either plan for the birth of a child with cystic fibrosis or terminate the pregnancy. Compl. ¶ 25. CVS is performed for no other reason than to provide such information to pregnant women and their families. Compl. ¶ 26.

On October 22, 2009, Kerrie, a 38-year-old married female, presented to Park Clinic for prenatal care at eight and 3/7 weeks gestation with an unplanned pregnancy. Compl. ¶ 27. Kerrie's prenatal care was provided by Scanson, an employee of Park Clinic. Compl. ¶ 28.

During Kerrie's initial prenatal appointment with Scanson, tests for various fetal diseases were discussed, among other things. Compl. ¶ 29. Scanson gave Kerrie a folder of brochures, including brochures on cystic fibrosis and CVS, which Kerrie leafed through as Scanson explained their content. Compl. ¶ 29. The brochures were published by ACOG. Compl. ¶ 30. Cystic fibrosis was the only genetic disease for which Kerrie was specifically given a brochure. Compl. ¶ 30.

When Kerrie saw the title of the cystic fibrosis brochure, "Cystic Fibrosis Prenatal Screening and Diagnosis," Kerrie expressed her and her husband Joe's concerns about the disease, telling Scanson that she and Joe had already had the most private of discussions about terminating the pregnancy in the event the fetus tested positive for cystic fibrosis or other

serious fetal abnormalities. Compl. ¶ 31. Close friends and family members knew of Kerrie and Joe's desires in this regard, as many shared in their feelings. Compl. ¶ 31.

When Kerrie described her and Joe's fears about cystic fibrosis, Scanson explained that cystic fibrosis is a recessive gene and that both Kerrie and Joe would have to have the gene in order for there to be a 1-in-4 chance that their child would have cystic fibrosis. Compl. ¶ 33. Although ACOG publishes another brochure entitled "Cystic Fibrosis Carrier Testing," Scanson did not provide that brochure to Kerrie. Compl. ¶ 34. The "Cystic Fibrosis Carrier Testing" brochure includes a place for a patient to document her decision regarding carrier testing and provides documentation of informed consent or declination of the testing in the following manner:

> **Informed Consent/Decline**
>
> You should be certain you understand the six items listed below. If you are not certain about any of them, please ask your health care provider to explain them further before signing this form accepting or declining [cystic fibrosis] carrier testing.
>
> (1) I understand that the decision to be tested for [cystic fibrosis] carrier status is completely mine.
>
> (2) I understand that the test does not detect all [cystic fibrosis] carriers.
>
> (3) I understand that if I am a carrier, testing the baby's father will help me learn more about the chance that my baby could have [cystic fibrosis].
>
> (4) I understand that if one parent is a carrier and the other is not, it is still possible that the baby will have [cystic fibrosis], but that the chance of this is very small.
>
> (5) I understand that if both parents are carriers, additional testing can be done in order to know whether or not the baby will have [cystic fibrosis].

(6) I understand that if the baby has inherited a changed [cystic fibrosis] gene from each parent, the only way to avoid the birth of a baby with [cystic fibrosis] is by terminating the pregnancy.

I have read and understand the information in this brochure and:

____ I do not want [cystic fibrosis] carrier testing

____ I want [cystic fibrosis] carrier testing

Signed: _____

Date: _____

Compl. ¶ 35.

At no time did Scanson: (1) inform Kerrie about carrier testing; (2) offer Kerrie carrier testing; or (3) otherwise discuss carrier testing with Kerrie. Compl. ¶¶ 36-38. Under Kerrie's insurance with Blue Cross Blue Shield ("BCBS"), all prenatal appointments are covered in full, as is all blood and diagnostic testing. Compl. ¶ 39. Consequently, carrier testing would not have cost Kerrie anything out-of-pocket. Compl. ¶ 39. Had carrier testing been offered to Kerrie, Kerrie would have requested it. Compl. ¶ 40. Had carrier testing been performed on Kerrie, it would have shown that Kerrie is a cystic fibrosis carrier. Compl. ¶ 41. Had carrier testing been performed on Joe, it would have shown that Joe is also a cystic fibrosis carrier. Compl. ¶ 42.

Scanson explained [cystic fibrosis] and other genetic disorders to Kerrie using a marble analogy:

> . . . You have a jar of 1000 marbles, and you reach in and pick one marble – that marble would represent a given genetic disorder, and look at the low odds of that happening.

Compl. ¶ 43. Scanson concluded her discussion with Kerrie by asking Kerrie if she felt like she absolutely needed to know whether she was a cystic fibrosis carrier. Compl. ¶ 44. Kerrie responded, "Yes, I need to know for sure." Compl. ¶ 44. Scanson and Kerrie then spoke about whether Kerrie would get an amniocentesis or a CVS. Compl. ¶ 45. Kerrie chose a CVS because a CVS can be performed earlier in a pregnancy than an amniocentesis and a CVS can test for the diseases Kerrie was most concerned about, including cystic fibrosis. Compl. ¶¶ 45-46.

After Kerrie chose to have a CVS, Scanson called and set up an appointment. Compl. ¶ 47. The appointment was set for November 17, 2009, at Defendant Bozeman Deaconess Hospital ("BDH"), with Defendant William Peters, MD ("Peters"), and through Peters' practice group, Defendant Bozeman OB/GYN – Billings Clinic ("Billings Clinic"). Compl. ¶ 48. Unknown to Kerrie, when Scanson made the appointment, Scanson failed to note that the CVS was to test for cystic fibrosis, marking only that the CVS was to be performed for "maternal age." Compl. ¶ 49. Maternal age alone is rarely a reason to perform a CVS since an amniocentesis is safer and just as effective at detecting disorders related to maternal age. Compl. ¶¶ 50-51.

The risks associated with a CVS can also be avoided by detecting potential disorders through an alpha-fetoprotein ("AFP") blood test. Compl. ¶ 52. An AFP blood test, also known as a "triple screen" or a "quad screen," is generally used for detecting neural tube defects. Compl. ¶ 52. However, an AFP blood test can also indicate serious defects, such as Down syndrome. Compl. ¶ 52. Kerrie would not have requested the riskier CVS had she known that it would not test for cystic fibrosis. Compl. ¶ 53.

Scanson told Kerrie that someone from Defendant Shodair Children's Hospital – Department of Medical Genetics ("Shodair") would contact her about genetic counseling prior to the CVS. About a week before her scheduled CVS, Billings Clinic also told Kerrie that Shodair would be contacting her about genetic counseling. Compl. ¶ 55. Genetic counseling should have been covered in full as a maternity benefit under Kerrie's BCBS insurance. Compl. ¶ 56. If genetic counseling was not covered in full as a maternity benefit under Kerrie's BCBS insurance, Kerrie would have paid a $30.00 co-pay, at most. Compl. ¶ 56. No one from Shodair contacted Kerrie about genetic counseling prior to her November 17, 2009 CVS appointment. Compl. ¶ 57.

Because no one from Shodair contacted Kerrie before her November 17, 2009 CVS appointment, Kerrie telephoned Shodair. Compl. ¶ 58. During that telephone conversation, a Shodair representative explained to Kerrie that Shodair usually does genetic counseling one week before the CVS procedure, but that genetic counseling is not mandatory. Compl. ¶ 59. The Shodair representative then asked Kerrie about her family history and told Kerrie she should go ahead with the CVS, even though she had not had genetic counseling, since: (1) at that time, no one in Kerrie's family had cystic fibrosis; (2) Kerrie did not have an appointment with a genetic counselor; and (3) genetic counseling is not mandatory. Compl. ¶ 60.

At the time of her November 17, 2009 CVS appointment, Kerrie believed her tissue samples would be tested for cystic fibrosis, among other serious disorders. Compl. ¶ 61. None of the Defendants ever: (1) advised Kerrie or provided her with information that her tissue samples were not to be tested for cystic fibrosis; (2) confirmed or provided Kerrie with any information about precisely what the CVS was testing for; (3) asked Kerrie whether genetic counseling had been performed; (4) asked Kerrie why she was having a CVS; (5)

asked Kerrie whether she had been offered carrier testing; or (6) provided Kerrie with informed consent concerning the CVS. Compl. ¶ 62.

On November 17, 2009, the CVS could not be completed as planned and was rescheduled for November 23, 2009. Compl. ¶ 63. Despite this delay, none of the Defendants, between November 17, 2009 and November 23, 2009: (1) advised Kerrie or provided her with information that her tissue samples were not to be tested for cystic fibrosis; (2) confirmed or provided Kerrie with any information about precisely what the CVS was testing for; (3) asked Kerrie whether genetic counseling had been performed; (4) asked Kerrie why she was having a CVS; (5) asked Kerrie whether she had been offered carrier testing; or (6) provided Kerrie with informed consent concerning the CVS. Compl. ¶ 64.

On November 23, 2009, Kerrie was admitted to BDH and the CVS was completed. Compl. ¶¶ 65, 67. Peters and Billings Clinic then sent Kerrie's tissue samples to Shodair. Compl. ¶ 68. Neither Peters nor Billings Clinic requested that Shodair test Kerrie's tissue samples for cystic fibrosis. Compl. ¶ 69. Rather, Peters and Billings Clinic indicated that the only reason for Kerrie's CVS was "maternal age" or "advanced maternal age." Compl. ¶ 69. Peters and Billings Clinic charged Kerrie for the CVS procedure. Compl. ¶ 76. Shodair charged Kerrie for the CVS interpretation and lab work. Compl. ¶ 77.

BDH promises its patients the right to receive as much information about any proposed treatment or procedure in order to give informed consent. Compl. ¶ 66. Kerrie discovered that the CVS did not test for cystic fibrosis after: (1) the CVS was performed; (2) her child was born; and (3) her child was diagnosed with cystic fibrosis. Compl. ¶ 66. Kerrie did not receive the CVS test she understood she had ordered. Compl. ¶ 78.

Had Kerrie's tissue samples been tested for cystic fibrosis, they would have tested positive for the disorder. Compl. ¶ 70. The results from Kerrie's CVS were sent to Kerrie's medical care providers, who indicated that the results were "normal." Compl. ¶ 71. In fact, the fetus was not "normal," but had cystic fibrosis. Compl. ¶ 72. Each of the Defendant health care providers knew of the risks of cystic fibrosis associated with Caucasian pregnancies. Compl. ¶ 74.

After Kerrie gave birth, the baby ("Baby Evans") was diagnosed with cystic fibrosis via newborn screening. Compl. ¶ 79. Since 2009, newborn screening for cystic fibrosis has been required in Montana. Compl. ¶ 79. A "sweat test" definitively diagnosed Baby Evans with cystic fibrosis. Compl. ¶ 81. Kerrie and Joe, previously excited about the prospects of raising a normal, healthy, child, were prepared neither emotionally nor financially to raise and care for a child with cystic fibrosis. Compl. ¶ 82.

When Kerrie called Park Clinic and questioned Scanson and other Park Clinic employees about how this happened, Kerrie was told the CVS did not test for cystic fibrosis and that they would check their brochures to make sure the brochures were not misleading. Compl. ¶ 83. Kerrie suggested Park Clinic implement a checklist so doctors and patients could go over: (1) the various tests; (2) which tests were available; (3) which tests were desired; (4) which tests were ordered; and (5) what the results of each test were. Compl. ¶ 84. Although Park Clinic did not use such a checklist, a similar checklist has been in place for years at Billings Clinic. Compl. ¶ 85. Park Clinic is affiliated with Billings Clinic and Peters is an employee of Billings Clinic. Compl. ¶¶ 86, 88.

The Billings Clinic checklist includes cystic fibrosis carrier testing as part of its standard prenatal discussions, including information as to whether the patient accepts or

declines the test. Compl. ¶ 93. The Billings Clinic checklist also provides a measure of safety by virtue of its inherent follow-up, requiring the documentation of patient discussions. Compl. ¶ 93. Had Kerrie's health care providers utilized such a checklist, they could have: (1) kept track of Kerrie's needs; (2) reviewed the checklist with Kerrie; (3) followed through on Kerrie's needs and care; (4) documented whether the follow-up was providing for Kerrie's needs and care; (5) documented Kerrie's awareness; (6) documented implementation of the plan of care; and (7) documented the development and follow-up of plans for implementing Kerrie's needs, desires, and concerns. Compl. ¶ 94.

In reasonable probability, had any of the Defendants used a checklist similar to the Billings Clinic checklist, the harm made the basis of this suit would have been avoided. Compl. ¶ 96. Since the incidents involved in this suit, all Defendants have been put on notice about the existence of the Billings Clinic checklist and the importance of utilizing a similar checklist in their practices and as part of their policies and procedures. Compl. ¶ 97. Each Defendant has failed to institute such a checklist. Compl. ¶ 98.

Based on the allegations outlined above, on October 21, 2011, Kerrie and Joe filed a Complaint against Park Clinic, Scanson, Billings Clinic, Peters, BDH, and Shodair. Therein, Kerrie and Joe assert claims for: (1) equitable relief; (2) negligence; (3) negligent misrepresentation; and (4) negligent infliction of emotional distress. Compl. ¶¶ 100-151.

Kerrie and Joe's claim for equitable relief provides, in its entirety:

> Plaintiffs seek equitable relief and ask the Court to require each of the [D]efendants to:
>
> > (1) [r]evise their informed consent procedures and provide proper informed consent that advise their patients of cystic fibrosis carrier [testing], and that such informed consent include a requirement that the patient sign a form specifically accepting or declining such

[testing]; and (2) [i]mplement institution-wide checklists that require patient and referring provider interaction, documentation and review of patient desires, the dissemination of information, and review of procedures.

Compl. ¶ 100.

Kerrie and Joe's claim for negligence provides, in relevant part:

(1) Defendants were negligent in their care of Kerrie . . . by:

(a) [f]ailing to appropriately advise, counsel, and educate Kerrie . . . about genetics and genetic testing;

(b) [f]ailing to properly warn Kerrie about the problems and the risks involved with having a child with a serious medical problem;

(c) [f]ailing to collect accurate information regarding the ethnicity of [Kerrie and Joe];

(d) [f]ailing to inform [Kerrie] of . . . [cystic fibrosis] carrier [testing];

(e) [f]ailing to inform [Kerrie] of the risks involved with giving birth to a child with a serious defect;

(f) [f]ailing to obtain [Kerrie's] informed consent concerning her desire for [cystic fibrosis] carrier [testing];

(g) [f]ailing to provide genetic counseling regarding . . . [cystic fibrosis] carrier [testing] . . . or determine whether it had been provided;

(h) [f]ailing to follow [cystic fibrosis] carrier [testing] recommendations issued by the:

(i) National Institutes of Health;
(ii) [ACOG]; and
(iii) [ACMG];

(i) [f]ailing to provide clear information regarding genetic tests covered in a routine CVS;

(j) [m]isdiagnosing and/or negligently misrepresenting the fetus' condition as "normal;"

(k) [f]ailing to detect the genetic defect; and

(l) [f]ailing to utilize an integrated checklist to keep track of, document, and follow through on [Kerrie's] needs and document, develop and implement the appropriate plan of care, such as that required by [Park Clinic's] affiliated organization[ ] and . . . Peters' employer, Billings Clinic.

(2) As a result of Defendants' breaches of duty, Kerrie . . . was harmed by not being given the chance to make an informed, intelligent decision about whether or not to terminate her pregnancy.

Compl. ¶¶ 107-108.

Kerrie and Joe's claim for negligent misrepresentation provides, in relevant part:

None of the Defendants advised Kerrie . . . (until after her child was born) that the CVS . . . tested only for Down syndrome and two other forms of trisomy. The Defendants' failures in this regard amount to a failure to use reasonable care or competence in obtaining or communicating the information to [Kerrie].

Compl. ¶¶ 141-142.

Kerrie and Joe's claim for negligent infliction of emotional distress provides, in its entirety:

Plaintiffs suffered emotional distress that was so severe that it resulted in physical harm and no reasonable person could be expected to endure it.

Plaintiffs' distress was a reasonably foreseeable consequence of, and was legally and proximately caused by Defendants' negligent acts and omissions.

Compl. ¶¶ 150-151.

In addition to the "equitable relief" outlined above, Kerrie and Joe ask to be awarded "those expenses associated with the parents rearing a child with cystic fibrosis, particularly the extraordinary medical expenses associated with the disease." Compl. ¶ 152. Kerrie and Joe seek the recovery of such "extraordinary medical expenses" for the duration of Baby

Evans' life. Compl. ¶ 155. Kerrie and Joe also seek compensation for their "mental and emotional distress," "loss of consortium," "impairment of their capacity to pursue an established course of life," "medical and psychological care and attention," "lost wages," and "lost earning capacity." Compl. ¶¶ 164-166.

Presently at issue is whether Kerrie and Joe's Complaint should be dismissed for failure to state a claim upon which relief can be granted. Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 1-2 (Dec. 19, 2011) (citing Rule 12(b)(6), M.R.Civ.P.).

SUMMARY OF THE PARTIES' BRIEFS

I. Park Clinic and Scanson's Motion to Dismiss and Brief in Support (Doc. 14)

Park Clinic and Scanson contend Kerrie and Joe's Complaint should be dismissed for failure to state a claim upon which relief can be granted because: (A) "Montana law does not recognize a cause of action for 'wrongful birth,' and, absent legislative authority, there is no basis for judicially creating such a cause of action;" (B) Kerrie and Joe cannot establish the "causation" element of their negligence claims; and (C) Kerrie and Joe cannot establish the "damages" element of their negligence claims. Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 5, 9.

A. Wrongful Birth

In support of their contention that "Montana law does not recognize a cause of action for 'wrongful birth,' and, absent legislative authority, there is no basis for judicially creating such a cause of action," Park Clinic and Scanson first assert the following:

> [Kerrie and Joe] are asking the Court to create a cause of action for "wrongful birth," and to award them damages for a missed opportunity to abort their daughter. The moral, emotional, and political implications of this claim are undeniably great. Because the Montana Supreme Court has never recognized a claim for wrongful birth, and because public policy weighs against judicially

> creating such a cause of action, [Kerrie and Joe's] Complaint must be dismissed for failure to state a claim for which relief can be granted.

Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 5-6.

Park Clinic and Scanson then note that: (1) "[o]utside of Montana, several states have taken legislative action to ban wrongful birth claims;" and (2) "Courts in three other states – Georgia, North Carolina, and Kentucky – have all refused to recognize claims for wrongful birth absent clear statutory authority allowing such a claim." Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 6-7 (citing Idaho Code Ann. § 5-334 (1985); Mich. Comp. Ls. Ann. § 600.2971 (2001); Minn. Stat. Ann. § 145.424 (1982); Mo. Rev. Stat. Ann. § 188.130 (1986); 42 Pa. Consol. Stat. Ann. §§ 5305, 8305 (1988); S.D. Codified Ls. §§ 21-55-1, 21-55-2 (1981); Ind. Code Ann. § 34-12-1-1 (1987); N.D. Cent. Code § 32-03-43 (1985); Utah Code Ann. § 78-11-24 (1983); *Atlanta Obstetrics and Gynecology Group, P.A. v. Abelson*, 398 S.E.2d 557, 560, 563 (Ga. 1990); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 532-533 (N.C. 1985); *Grubbs v. Barbourville Family Health Center, P.S.C.*, 120 S.W.3d 682, 689-690 (Ky. 2003)).

According to Park Clinic and Scanson, the Court should recognize the "magnitude" of the following public policy concerns implicated in a wrongful birth claim and decline to "judicially create" such a cause of action:

> Baby Evans has cystic fibrosis. She will likely require some form of medical treatment for the remainder of her life. Yet, despite this medical condition, there has been no claim that Baby Evans suffers from any kind of mental disability or that her parents will be deprived of any real parent-child relationship . . . . Baby Evans has no cognitive impairments. If the Court allows [Kerrie and Joe] to recover wrongful birth damages under these circumstances, the door will be open for a wide range of claims by parents who allege (with the benefit of hindsight) that they would have aborted their child had they known he or she would suffer from a genetic "defect." Parents of children born with diabetes, hemophilia, or any other genetic and potentially

> fatal disease could seek damages for a lost abortion right. The resulting liability – and increased burden on physicians – is limitless.

Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 7-9 (citing *Azzolino*, 337 S.E.2d at 535).

B. Causation

In support of their contention that Kerrie and Joe cannot establish the "causation" element of their negligence claims, Park Clinic and Scanson first assert the following:

> Cystic fibrosis is an incurable, genetic disease that is inherited at the time of conception. Neither [Park Clinic] nor Scanson caused Baby Evans to contract cystic fibrosis, and neither could have cured or prevented this disease *in utero*.

Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 10 (citing *Butler v. Domin*, 2000 MT 312, ¶ 21, 302 Mont. 452, 15 P.3d 1189; *Montana Deaconess Hospital v. Gratton*, 169 Mont. 185, 189, 545 P.2d 670, 672 (1976); *Falcon v. Cheung*, 257 Mont. 296, 303, 848 P.2d 1050, 1054 (1993); *Estate of Nielsen v. Pardis*, 265 Mont. 470, 473, 878 P.2d 234, 235-236 (1994); *Rudeck v. Wright*, 218 Mont. 41, 52, 54, 709 P.2d 621, 628-629 (1985)).

Park Clinic and Scanson then note that in *Abelson*, the Georgia Supreme Court applied a traditional negligence analysis to a wrongful birth claim and dismissed the claim for lack of causation, explaining:

> The traditional tort analysis breaks down even further with the final prong, that of causation, as the defendants cannot be said to have caused the impairment in [the plaintiffs' child]. "The [impairment] is genetic and not the result of any injury negligently inflicted by the [defendants]. In addition it is incurable and was incurable from the moment of conception. Thus the [defendants'] alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's [impairment] is an inexorable result of conception and birth."

Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 11 (citing *Abelson*, 398 S.E.2d at 561 (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 816 (N.Y. 1978) (Wachtler, J., dissenting))).

C. Damages

In support of their contention that Kerrie and Joe cannot establish the "damages" element of their negligence claims, Park Clinic and Scanson first assert the following:

> [Kerrie and Joe's] damage claim is based on the assertion that, had they known Baby Evans would be diagnosed with cystic fibrosis, they would have aborted her. In assessing damages, [Kerrie and Joe] are not asking the Court to compare a child who suffers from cystic fibrosis with an otherwise healthy child. Rather, [Kerrie and Joe] are asking the Court to compare a child who suffers from cystic fibrosis with *nonexistence*. This is an impossible task . . . .

Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 12 (emphasis in original) (citing *Cremer v. Cremer Rodeo Land and Livestock*, 192 Mont. 208, 214, 627 P.2d 1199, 1201 (1981); *Albers v. Bar ZF Ranch, Inc.*, 229 Mont. 396, 404, 747 P.2d 1347, 1351 (1987)).

Next, Park Clinic and Scanson note that in *Azzolino*, the North Carolina Supreme Court held the following:

> Courts which purport to analyze wrongful birth claims in terms of "traditional" tort analysis are able to proceed to this point but no further before their "traditional" analysis leaves all tradition behind or begins to break down. In order to allow recovery such courts must then take a step into *entirely untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable at law. Far from being "traditional" tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction. We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury.

Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 13 (citing *Azzolino*, 337 S.E.2d at 534 (emphasis in original)).

Finally, Park Clinic and Scanson assert that "[w]hile some courts *have* allowed plaintiffs to pursue a negligence action for wrongful birth, these courts have reached inconsistent and conflicting conclusions in regard to damages." Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 13 (emphasis in original) (citing *Schirmer v. Mt. Auburn Obstetrics and Gynecologic Associates, Inc.*, 844 N.E.2d 1160, 1167 (Ohio 2006) (damages limited to "costs arising from continuation of the pregnancy after the negligent act and for the birth of the child"); *Becker*, 386 N.E.2d at ____ (damages limited to recovery of the child's medical expenses); *Viccaro v. Milunsky*, 551 N.E.2d 8, 9-10 (Mass. 1990) (damages allowed for the "extraordinary expenses" of raising a child with a disability past the child's age of majority); *Arche v. U.S. Department of the Army*, 798 P.2d 477, 480 (Kan. 1990) (damages allowed for the "extraordinary expenses" of raising a child with a disability until the child reaches the age of majority); *Taxiera v. Malkus*, 578 A.2d 761, 764 (Md. 1990) (damages allowed for the "extraordinary expenses" of raising a child with a disability until the parents' death)). In light of these allegedly "inconsistent and conflicting conclusions," Park Clinic and Scanson assert that "[i]f the Court allows [Kerrie and Joe] to proceed with their Complaint, the Court must . . . define the scope of available damages." Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 14.

II. Kerrie and Joe's Answer Brief in Opposition to Park Clinic and Scanson's Motion to Dismiss (Doc. 20)

Kerrie and Joe contend their Complaint should not be dismissed for failure to state a claim upon which relief can be granted because: (A) this is a "case of negligence, not a new tort" for "wrongful birth;" (B) "causation is clear in this matter;" and (C) "damages are

ascertainable." Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 14, 22, 25 (Jan. 3, 2012).

A. Wrongful Birth

In support of their contention that this is a "case of negligence, not a new tort" for "wrongful birth," Kerrie and Joe first assert the following:

> There is no Montana legislation dealing with the issues in this case. As such, the question, then, is whether [Kerrie and Joe] have stated a claim for which relief can be granted by applying the underlying logic of the common law. In this regard, the common law principles of negligence have been recognized since Montana was a territory, referred to even then as "old" by Decius Spear Wade, Chief Justice of the Montana Territorial Supreme Court between 1871 and 1887:
>
> > In this age of the world the discovery of new principles of law is rare, but there is a constant application of old principles to new facts and conditions.
>
> Indeed, the "application of old principles to new facts and conditions" is all that is required in this case, and this court need look no further than *Jackson* . . . for the controlling Montana caselaw.

Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 14-15 (citing Andrew P. Morriss, *Legal Argument in the Opinions of Montana Territorial Chief Justice Decius S. Wade*, 1 Nev. L.J. 38, 55 (2001); *Jackson v. State*, 1998 MT 46, ____, 287 Mont. 473, 956 P.2d 35).

Kerrie and Joe then summarize *Jackson* as follows:

> In *Jackson*, an adoptive family sued the state for various negligence claims (negligent misrepresentation, negligent nondisclosure, negligence based on lack of informed consent, and negligent supervision) surrounding the State's failure to disclose the psychological and medical background of their adoptive son's natural parents. The adoptive parents alleged that, had they been told about the child's background, they would not have adopted him, and the action was at times cast as one for "wrongful adoption."

> The *Jackson* Court addressed the issue of needlessly labeling a cause of action involving long-standing common law principles as a "new tort," explaining that:
>
> > [A] number of courts have recognized "that the question of whether to recognize causes of action for 'wrongful adoption' simply requires the straightforward application and extension of well-recognized common-law actions, such as negligence and fraud, to the adoption context and not the creation of new torts."

Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 15-16 (citing *Jackson*, ¶¶ 1, 27, 79).

According to Kerrie and Joe, like in *Jackson*, "what has been labeled 'wrongful birth' [by Park Clinic and Scanson] requires no more than an extension of [the following] established common law principles to the technological advances of genetic prenatal testing within the context of the law recognizing a woman's right to terminate her pregnancy": (1) medical negligence; (2) negligent misrepresentation; and (3) negligent infliction of emotional distress. Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 16-20 (citing *Greco v. U.S.*, 893 P.2d 345, 348 (Nev. 1995); *Bader v. Johnson*, 732 N.E. 1212, 1216-1218, n. 6 (Ind. 2000); *Owens v. Foote*, 773 S.W.2d 911, 913 (Tenn. 1989); *Gratton*, 169 Mont. at 189, 545 P.2d at 672; *Jackson*, ¶¶ 36-37; *Henricksen v. State*, 2004 MT 20, ¶ 72, 319 Mont. 307, 84 P.3d 38; *Guest v. McLaverty*, 2006 MT 150, ¶ 2, 332 Mont. 421, 138 P.3d 812).

Finally, Kerrie and Joe note the following "constitutional ramifications and implications of [Park Clinic and Scanson's] argument":

> In addition to common law notions of providing a remedy for every wrong, Montana's Constitution requires that our courts "be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury . . . . ."

> Constitutional rights that cannot be enforced are illusory and are rendered meaningless absent the courts being able to enforce these rights . . . .

Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 20 (citing Mont. Const. art. II, § 16; *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 58, 310 Mont. 123, 54 P.3d 1 (Nelson, J., concurring)).

B. Causation

In support of their contention that "causation is clear in this matter," Kerrie and Joe first assert the following:

> In support of their argument, Defendants define the injury as the child's impairment, the cystic fibrosis itself, which then allows them to argue that the genetic disease is the result of conception, not the Defendants' negligence. Although the argument seems logical, it is incorrect. It is incorrect because it wrongly defines [Kerrie and Joe's] claimed injury as the genetic disease, when the stated injury is, "But for the [D]efendants' failures, Kerrie . . . would have terminated the pregnancy."

Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 22.

Kerrie and Joe then note that "[i]n *Jackson*, the Court defined causation by identifying the injury and resulting damages in that case as the State's withholding and misrepresentation of material facts, which caused the plaintiffs to 'adopt a child they would not have otherwise adopted.'" Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 24 (citing *Jackson*, ¶ 83). According to Kerrie and Joe:

> The analogous situation in [this] case is clear – had the [D]efendants provided appropriate informed consent concerning carrier screening, and had requested genetic tests been conducted and reported, [Kerrie and Joe] would have terminated the pregnancy so that their child would not have been born with cystic fibrosis, they would not have been injured, and they would not have incurred the overwhelming damages they now suffer.

Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 24-25.

C. Damages

In support of their contention that "damages are ascertainable," Kerrie and Joe first note that: (1) Montana's Pattern Jury Instructions expressly provide that "[r]ecovery cannot be denied for damages simply because they are difficult to determine;" and (2) the Montana Supreme Court has long held that "[a] plaintiff will not be denied recovery simply because it is difficult to ascertain the amount of his damages, as long as the amount can be proven with a reasonable degree of certainty." Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 25 (citing MPI2d 25.90; *Cut Bank School District No. 15 v. Rummel*, 2002 MT 248, ¶ 8, 312 Mont. 143, 58 P.3d 159).

Kerrie and Joe then assert the following:

> Defendants' public policy arguments, such as that allowing recovery is akin to disavowing the value of life, are the same arguments that courts began rejecting as no longer valid after the United States Supreme Court's decision in *Roe v. Wade*. Pertinent to this Court's consideration in the instant case, one court questioned "how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges afforded to all members of society."

Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 26 (citing *Roe v. Wade*, 410 U.S. 113, ____ (1973); *Keel v. Banach*, 624 So.2d 1022, 1026 (Ala. 1993); *Turpin v. Sortini*, 643 P.2d 954, 961-962 (Cal. 1982)).

Next, Kerrie and Joe assert that "there is overwhelming precedent in states that recognize this kind of cause of action for recovery of damages for extraordinary expenses, including medical costs necessary to treat the birth defect, as well as any additional educational or medical costs attributable to the birth defect, such as hospital or specialized care." Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 28

(citing *Greco*, 893 P.2d at 349; *Keel*, 624 So.2d at 1030; *Turpin*, 643 P.2d at 965; *Lininger v. Eisenbaum*, 764 P.2d 1202, 1207 (Colo. 1988); *Garrison v. Medical Center of Delaware, Inc.*, 581 A.2d 288, 292 (Del. 1989); *Haymon v. Wilkerson*, 535 A.2d 880, 886 (D.C. App. 1987); *Kush v. Lloyd*, 616 So.2d 415, 424 (Fla. 1992); *Siemieniec v. Lutheran General Hospital*, 512 N.E.2d 691, 706-707 (Ill. 1987); *Arche*, 798 P.2d at 481; *Thibeault v. Larson*, 666 A.2d 112, 114 (Me. 1995); *Viccaro*, 551 N.E.2d at 10; *Becker*, 386 N.E.2d at 813; *Smith v. Cote*, 513 A.2d 341, 349-350 (N.H. 1986); *Emerson v. Magendantz*, 689 A.2d 409, 414 (R.I. 1997); *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 493 (Wash. 1983); *James G. v. Caserta*, 332 S.E.2d 872, 882-883 (W. Va. 1985); *Dumer v. St. Michael's Hospital*, 233 N.W.2d 372, 377 (Wis. 1975)).

Finally, Kerrie and Joe assert that, pursuant to *In re Guardianship of M.A.S.*, they are entitled to damages for the extraordinary expenses of raising Baby Evans past Baby Evans' age of majority. Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 28-29 (citing *In re Guardianship of M.A.S.*, 2011 MT 313, ____, 363 Mont. 96, 266 P.3d 1267).

III. Park Clinic and Scanson's Reply Brief in Support of Motion to Dismiss (Doc. 22)

A. Wrongful Birth

In response to Kerrie and Joe's contention that "this court need look no further than *Jackson* . . . for the controlling Montana caselaw," Park Clinic and Scanson assert the following:

> [Kerrie and Joe] do not dispute that Montana law has never recognized a cause of action for "wrongful birth." Nevertheless, [Kerrie and Joe] claim this is *not* a matter of first impression, because the Montana Supreme Court has considered a claim for "wrongful adoption" and applied "common law principles" to that claim. Wrongful birth and wrongful adoption are distinctly

> unrelated causes of action, involving different parties, different legal theories, and different elements. Because Montana law does not recognize a cause of action for wrongful birth and because the Complaint raises complex political and moral questions which are more appropriately addressed by the Legislature, this Court should dismiss [Kerrie and Joe's] Complaint for failure to state a claim for which relief can be granted.

Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 2 (Jan. 17, 2012) (emphasis in original) (citing *Collier v. Krane*, 763 F.Supp. 473, 474, n. 2 (D. Colo. 1991)).

Park Clinic and Scanson then assert that: (1) "knowledge of a material fact and misrepresentation of that fact are essential to a wrongful adoption action;" and (2) "in this case, none of the defendants **knew** Baby Evans had cystic fibrosis, and none of the defendants **misrepresented** that information to [Kerrie and Joe]." Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 2-4 (emphasis in original) (citing 2 C.J.S. *Adoption of Persons* § 13 (2011) (citing *Juman v. Louise Wise Services*, 159 Misc. 2d 314, ____ (N.Y. Sup. 1994); *Roe v. Catholic Charities of the Diocese of Springfield, Illinois*, 588 N.E.2d 354, ____ (Ill. App. 1992)); *Jackson*, ¶¶ 8-9, 12-16, 19, 21, 28, 61).

Finally, Park Clinic and Scanson contend that: (1) Kerrie and Joe's "wrongful birth" claim resembles a claim for "wrongful life;" (2) courts have nearly universally rejected "wrongful life" claims; and (3) "[t]he same public policy concerns that weigh against recognizing a claim for wrongful life also weigh against recognizing a claim for wrongful birth." Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 5-6 (citing *Abelson*, 398 S.E.2d at 559; *Azzolino*, 337 S.E.2d at 532-533; *Taylor v. Kurpati*, 600 N.W.2d 670, 676 (Mich. App. 1999); *Becker*, 386 N.E.2d at ____; *Grubbs*, 120 S.W.3d at 687-690). Park Clinic and Scanson identify these "public policy concerns" as follows:

> If allowed to proceed in this action, [Kerrie and Joe] will ask the jury to award them damages for *the very existence of their daughter*. There is something

> fundamentally wrong with such a claim. Surprisingly, [Kerrie and Joe] assert their cause of action is supported by "the underlying logic of the common law." Yet, there is nothing logical about awarding damages for *life*. The common law certainly does not support a finding that *life*, even impaired life, is a legal damage. While [Kerrie and Joe] argue that their claims fit neatly into the rubric of a traditional negligence analysis, that is simply not the case. In reality, [Kerrie and Joe] are asking the Court to create a new cause of action for a birth-related tort. There is no basis – in Montana's case law, Montana's statutory law, or the common law – for creating this new cause of action.

Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 6 (emphasis in original) (internal citations omitted).

B. Causation

In response to Kerrie and Joe's contention that "causation is clear in this matter," Park Clinic and Scanson assert the following:

> Even if the Court defines [Kerrie and Joe's] injury as a lost abortion right, causation cannot be established. No doctor can guarantee the birth of a "perfect" baby. With every birth, even under the best circumstances, there is a real risk that the child will be born with a genetic "abnormality" or "limitation." In this case, Scanson counseled [Kerrie] about the risks of genetic disorders and even provided her with a brochure entitled, "Cystic Fibrosis and Prenatal Screening and Diagnosis." Despite her receipt of this information, the clear implication of the Complaint is that [Kerrie] did not request cystic fibrosis carrier testing or testing of the CVS sample to check for cystic fibrosis. She also did not exercise her right to obtain a legal abortion. In hindsight, [Kerrie] now claims she would have aborted her daughter had she learned of her cystic fibrosis diagnosis. But, at the time, [Kerrie] was the only person who could have made that decision. Without seeking more information or requesting additional studies, [Kerrie] chose to continue with the pregnancy. Thus, there can be no claim that the defendants caused [Kerrie] to lose her right to a legal abortion. Under a traditional negligence analysis, [Kerrie and Joe's] Complaint fails for lack of causation.

Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 8 (internal citations omitted).

C. Damages

In response to Kerrie and Joe's contention that "damages are ascertainable," Park Clinic and Scanson reiterate their contention that Kerrie and Joe are asking the Court to "compare the incomparable: human life versus nonexistence." Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 10.

In support of their contentions in this regard, Park Clinic and Scanson first quote the following portion of the North Carolina Supreme Court's decision in *Azzolino*:

> Although courts and commentators have attempted to make it such, wrongful birth is not an ordinary tort. It is one thing to compensate destruction; it is quite another to compensate creation. This so-called "wrong" is unique: It is a new and on-going condition. As life, it necessarily interacts with other lives. Indeed, it draws its "injurious" nature from the predilections of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages.

Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 10 (citing *Azzolino*, 337 S.E.2d at 534-535).

Next, Park Clinic and Scanson note that in *Grubbs*, the Kentucky Supreme Court "echoed this concern," holding, "we are unwilling to equate the loss of an abortion opportunity resulting in a genetically or congenitally impaired human life, even severely impaired, with a cognizable legal injury." Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 10 (citing *Grubbs*, 120 S.W.3d at 689).

Park Clinic and Scanson then assert that "the Montana Legislature has expressed a public policy of valuing life with disabilities over nonexistence" by repealing Montana's "eugenic sterilization statutes." Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 10-11 (citing 1923 Mont. Ls. 534-537; 1960 Mont. Ls. 810-814; 1962 Mont. Ls. 762; 1981 Mont. Ls. 430).

Finally, Park Clinic and Scanson assert that *In re Guardianship of M.A.S.* does not support Kerrie and Joe's contention that they are entitled to damages for the extraordinary expenses of raising Baby Evans past Baby Evans' age of majority because: (1) "[t]he guardianship statutes at issue in [*In re Guardianship of M.A.S.*] do not apply to this wrongful birth action;" and (2) "although Baby Evans has been diagnosed with cystic fibrosis, there is no allegation that she suffers a cognitive impairment, that she will be dependent upon her parents for the rest of her life, or that she will be unable to work." Park Clinic & Scanson's Reply Br. in Support of Mot. to Dismiss 11 (citing *In re Guardianship of M.A.S.*, ¶ 14).

IV. Kerrie and Joe's Objections to Park Clinic and Scanson's Reply Brief (Doc. 28)

In response to Park Clinic and Scanson's Reply Brief, Kerrie and Joe assert Objections regarding the following arguments they contend are "outside of the allegations made in [their] Complaint": (A) argument "implying Kerrie . . . was at fault for not requesting information;" (B) argument that "insert[s] 'wrongful life' elements in a case where [wrongful life claims are] not alleged;" (C) argument "implying that Kerrie caused her own damages;" and (D) argument intended to limit Kerrie and Joe's damages. Kerrie & Joe's Objections to Park Clinic & Scanson's Reply Br. 2-9 (June 8, 2012). Pursuant to their Objections, Kerrie and Joe ask that the Court strike these "inappropriate" arguments from the record. Kerrie & Joe's Objections to Park Clinic & Scanson's Reply Br. 2-9.

V. Park Clinic and Scanson's Response to Kerrie and Joe's Objections (Doc. 29)

In response to Kerrie and Joe's Objections, Park Clinic and Scanson first assert that Kerrie and Joe's Objections are "procedurally impermissible" under Rule 2(a), Mont. Unif. Dist. Ct. R., which "allows an opening brief, response brief, and reply brief," but "does not contemplate an additional 'objection' brief." Park Clinic & Scanson's Response to Kerrie &

Joe's Objections 2 (Feb. 2, 2012) (citing Rule 2(a), Mont. Unif. Dist. Ct. R.). Next, Park Clinic and Scanson assert that Kerrie and Joe "had the opportunity to raise their 'Objections' in their response brief, and they failed to do so." Park Clinic & Scanson's Response to Kerrie & Joe's Objections 3. Finally, Park Clinic and Scanson assert that Kerrie and Joe's Objections are "unfounded," as they are "entitled to draw reasonable inferences from the Complaint." Park Clinic & Scanson's Response to Kerrie & Joe's Objections 4.

STANDARD OF REVIEW

> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.

Reidelbach v. Burlington Northern & Santa Fe Railway Company, 2002 MT 289, ¶ 14, 312 Mont. 498, 60 P.3d 418. "The only relevant document when considering a motion to dismiss is the complaint and any documents it incorporates by reference." *Cowan v. Cowan*, 2004 MT 97, ¶ 11, 321 Mont. 13, 89 P.3d 6 (citing *City of Cut Bank v. Tom Patrick Construction, Inc.*, 1998 MT 219, ¶ 20, 290 Mont. 470, 963 P.2d 1283).

> As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim.

Wheeler v. Moe, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973).

DISCUSSION

A. Objections

The Court finds that Kerrie and Joe's Objections to Park Clinic and Scanson's Reply Brief are procedurally improper and lack substantive merit. *See* Park Clinic & Scanson's Response to Kerrie & Joe's Objections 2, 4 (citing Rule 2(a), Mont. Unif. Dist. Ct. R.).

Rule 2(a), Mont. Unif. Dist. Ct. R. allows Kerrie and Joe to file an answer brief and "appropriate supporting documents" in response to Park Clinic and Scanson's Motion to Dismiss. Rule 2(a), Mont. Unif. Dist. Ct. R. then gives Park Clinic and Scanson, as the bearers of the burden of proof, the "last word" in the form of a reply brief. In an apparent attempt to circumvent this procedure, Kerrie and Joe have responded to Park Clinic and Scanson's Reply Brief by filing "Objections." Pursuant to Rule 2(a), Mont. Unif. Dist. Ct. R., the filing of these Objections is procedurally improper. *See* Park Clinic & Scanson's Response to Kerrie & Joe's Objections 2.

Moreover, since Park Clinic and Scanson are entitled to draw reasonable inferences from Kerrie and Joe's Complaint, and make arguments based thereon, Kerrie and Joe's Objections also lack substantive merit. *See* Park Clinic & Scanson's Response to Kerrie & Joe's Objections 4. Consequently, the Court has considered the arguments made by Park Clinic and Scanson in their Reply Brief, and overrules Kerrie and Joe's Objections.

B. Wrongful Birth

The Court agrees with Kerrie and Joe that, like in *Jackson*, "what has been labeled 'wrongful birth' [by Park Clinic and Scanson] requires no more than an extension of [the following] established common law principles to the technological advances of genetic prenatal testing within the context of the law recognizing a woman's right to terminate her

pregnancy": (1) medical negligence; (2) negligent misrepresentation; and (3) negligent infliction of emotional distress. Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 16-20 (citing *Greco*, 893 P.2d at 348; *Bader*, 732 N.E. at 1216-1218, n. 6; *Owens*, 773 S.W.2d at 913; *Gratton*, 169 Mont. at 189, 545 P.2d at 672; *Jackson*, ¶¶ 36-37; *Henricksen*, ¶ 72; *Guest*, ¶ 2). As such, in this case, the Court need not defer to the legislature and **NEED NOT UTILIZE THE MISLEADING AND INFLAMMATORY "WRONGFUL BIRTH" LABEL**. *See Viccaro*, 551 N.E.2d at 9, n. 3 (noting that the "wrongful birth" label is not instructive as "[a]ny 'wrongfulness' lies not in the . . . birth, . . . but in the negligence of the physician"); *Garrison*, 581 A.2d at 291 ("The cause of action we recognize lies in negligence, and it is a judicial function to determine the contours of the common law of negligence. Therefore, legislative action is not required.") (citing *Gildiner v. Thomas Jefferson University Hospital*, 451 F. Supp. 692, 696 (E.D. Pa. 1978)).

> [The Court] is also convinced that the relevant policy considerations, far from militating against [Kerrie and Joe's claims, as Park Clinic and Scanson contend], actually support . . . recognition [of the claims].
>
> > Society has an interest in insuring that genetic testing is properly [advised,] performed[,] and interpreted. The failure to properly [advise,] perform[,] or interpret [genetic tests] could cause either the abortion of a healthy fetus, or the unwanted birth of . . . (an afflicted) child . . . . Either of these occurrences is contrary to . . . public policy . . . . The recognition of a cause of action for negligence in the performance of genetic testing would encourage the accurate performance of such testing by penalizing physicians who fail to observe customary standards of good medical practice.
>
> The increasing importance of these procedures in modern life and their entry into the mainstream of accepted medical practices . . . as well as the extreme sensitivity of the issues and interests involved, dictate that [Kerrie and Joe's] rights be afforded some protection.

Phillips v. U.S., 508 F. Supp. 544, 551 (D.S.C. 1981) (internal citations omitted) (citing *Becker*, 386 N.E.2d at ____; *Clegg v. Chase*, 89 Misc.2d 510, ____ (N.Y. Sup. 1977); Saul, *Amniocentesis and Prenatal Diagnosis in South Carolina: A Collaborative Report for the Years 1976 to 1979*, 76 J.S.C. Med. Ass'n. 387, 387-389 (1980)) (quoting *Gildiner*, 451 F. Supp. at 696); *see also Phillips*, 508 F. Supp. at 550 (quoting *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979)).

Finally, the Court notes that it is not persuaded by Park Clinic and Scanson's contention that recognizing the viability of Kerrie and Joe's claims will open the door for "a wide range of claims by parents who allege (with the benefit of hindsight) that they would have aborted their child had they known he or she would suffer from a genetic 'defect.'" *See* Park Clinic & Scanson's Mot. to Dismiss & Br. in Support 7-9 (citing *Azzolino*, 337 S.E.2d at 535). Publicly acknowledging one's desire for an abortion after the child's birth, which Kerrie and Joe's claims require, cannot be easy for any parent. Consequently, the number of parents willing to assert claims similar to Kerrie and Joe's claims is presumably low. Moreover, even if a significant number of parents are willing to assert similar claims, Montana's Constitutional guarantee that its courts will be "open to every person, and speedy remedy afforded for every injury of person, property, or character," requires recognition thereof. *See Lininger*, 764 P.2d at 1207-1208; Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 20 (citing Mont. Const. art. II, § 16; *Kloss*, ¶ 58).

C. Causation

Contrary to Park Clinic and Scanson's contentions, the Court finds that the allegations in Kerrie and Joe's Complaint, if proven, present sufficient evidence from which the trier of fact may find that the "causation" element of Kerrie and Joe's negligence claims has been

satisfied. Kerrie and Joe claim the Defendant health care providers' negligence caused Kerrie to lose her right to "make an informed, intelligent decision about whether or not to terminate her pregnancy." *See* Compl. ¶ 108; *Greco*, 893 P.2d at 349.

> [Kerrie and Joe's] claim[s] . . . can be compared to [claims] in which a physician negligently fails to diagnose cancer in a patient. Even though the physician did not *cause* the cancer, the physician can be held liable for damages resulting from the patient's decreased opportunity to fight the cancer, and for the more extensive pain, suffering and medical treatment the patient must undergo by reason of the negligent diagnosis. The "chance" [allegedly] lost here, was [Kerrie's] legally protected right to choose whether to [have an abortion]. If we were to deny [Kerrie and Joe's] claim[s], we would, in effect, be groundlessly excepting one type of medical malpractice from negligence liability. We see no reason to treat this case any differently from any other medical malpractice case.

Greco, 893 P.2d at 349 (emphasis in original) (internal citations omitted) (citing *Perez v. Las Vegas Medical Center*, 805 P.2d 589, ____ (1991)). If the allegations in Kerrie and Joe's Complaint are proven, "it can clearly be said that but for [the Defendant health care providers' negligence, Kerrie] would have obtained an abortion and [Kerrie and Joe] would not have suffered the damages for which they seek recovery." *See Robak v. U.S.*, 658 F.2d 471, 477 (7th Cir. 1981); Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 22. Consequently, Kerrie and Joe have made a *prima facie* claim of causation. *See Bader*, 732 N.E. at 1218-1219.

D. Damages

Contrary to Park Clinic and Scanson's contentions, the Court finds that the allegations in Kerrie and Joe's Complaint, if proven, present sufficient evidence from which the trier of fact may find that the "damages" element of Kerrie and Joe's negligence claims has been satisfied.

Although quantifying the amount of Kerrie and Joe's alleged damages may be difficult for the trier of fact: (1) Montana's Pattern Jury Instructions expressly provide that "[r]ecovery cannot be denied for damages simply because they are difficult to determine;" and (2) the Montana Supreme Court has long held that "[a] plaintiff will not be denied recovery simply because it is difficult to ascertain the amount of his damages, as long as the amount can be proven with a reasonable degree of certainty." Kerrie & Joe's Ans. Br. in Opposition to Park Clinic & Scanson's Mot. to Dismiss 25 (citing MPI2d 25.90; *Cut Bank School District No. 15*, ¶ 8).

Next, the Court notes that Park Clinic and Scanson's contention that Baby Evans' life must be viewed as wholly injurious in order for the "damages" element of Kerrie and Joe's negligence claims to be satisfied, misconstrues the alleged injury at issue. As pled, the alleged injury at issue is Kerrie's lost right to "make an informed, intelligent decision about whether or not to terminate her pregnancy." *See* Compl. ¶ 108; *Greco*, 893 P.2d at 349; *Bader*, 732 N.E. at 1219. Although compensation for this alleged injury, in the form of damages, "can be measured by the medical and other costs directly attributable to [Baby Evans' life]," it does not require Baby Evans' life to be viewed as wholly injurious. *See Bader*, 732 N.E. at 1220-1221. As noted by the Supreme Court of California in *Turpin*, "it is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society." *Turpin*, 643 P.2d at 961-962.

> [Moreover,] [c]onsidering the short life span of many . . . children [with horrendous diseases like cystic fibrosis] and their frequently very limited ability to perceive or enjoy the benefits of life, [this Court] cannot assert with

> confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all.

Turpin, 643 P.2d at 963.

With regard to the scope of available damages, pursuant to the following reasoning, the Court finds that the trier of fact should be allowed to consider all of the damages sought by Kerrie and Joe:

> [T]he central policy of all tort law is to place a person in a position nearly equivalent to what would have existed had the defendants' conduct not breached a duty owed to plaintiffs, thereby causing injury . . . . This policy can be fulfilled here only by allowing [the potential] recovery of all [of the damages sought by Kerrie and Joe].

Kush, 616 So.2d at 424 (internal citations omitted) (citing *Fassoulas v. Ramey,* 450 So. 2d 822, 823-824 (Fla. 1984); *Lloyd v. North Broward Hospital District*, 570 So. 2d 984, 989 (Fla. Dist. App. 1990)); Compl. ¶¶ 100, 152, 155, 164-165. The Court also finds that the trier of fact should be allowed to consider awarding these damages for the duration of Baby Evans' life expectancy, since parents of a handicapped child are generally required to support the child beyond the age of majority if the child cannot support himself or herself. *See Arche*, 798 P.2d at 483-485; *Greco*, 893 P.2d at 350; *Garrison*, 581 A.2d at 292; *Viccaro*, 551 N.E.2d at 11; *James G.*, 332 S.E.2d at 882-883; *Siemieniec*, 512 N.E.2d at 706.

CONCLUSION

The following states have recognized the viability of claims similar to those made by Kerrie and Joe: Alabama (*Robak*, 658 F.2d at 474-476); Arizona (*Walker v. Mart*, 790 P.2d 735, 738 (Ariz. 1990)); California (*Turpin*, 643 P.2d at 965-966); Colorado (*Lininger*, 764 P.2d at 1206-1207); Connecticut (*Rich v. Foye*, 976 A.2d 819, 825-826 (Conn. Super. 2007)); Delaware (*Garrison*, 581 A.2d at 290); The District of Columbia (*Haymon*, 535 A.2d at 885); Florida (*Kush*, 616 So.2d at 422-423); Illinois (*Siemieniec*, 512 N.E.2d at 705-706); Indiana

(*Bader*, 732 N.E. at 1218-1219); Kansas (*Arche*, 798 P.2d at 479-481); Louisiana (*Pitre v. Opelousas General Hospital*, 530 So. 2d 1151, 1158 (La. 1988)); Maine (*Thibeault*, 666 A.2d at 115); Maryland (*Reed v. Campagnolo*, 630 A.2d 1145, 1147-1152 (Md. 1993)); Massachusetts (*Viccaro*, 551 N.E.2d at 10); Nevada (*Greco*, 893 P.2d at 348-349); New Hampshire (*Smith*, 513 A.2d at 348); New Jersey (*Berman*, 404 A.2d at 14); New York (*Becker*, 386 N.E.2d at 813); Ohio (*Schirmer*, 844 N.E.2d at 1168); Rhode Island (*Emerson*, 689 A.2d at 414); South Carolina (*Phillips*, 508 F. Supp. at 551); Tennessee (*Owens*, 773 S.W.2d at 913); Texas (*Jacobs*, 519 S.W.2d at 849-850); Virginia (*Naccash v. Burger*, 290 S.E.2d 825, 830-831 (Va. 1982)); Washington (*Harbeson*, 656 P.2d at 476-477); West Virginia (*James G.*, 332 S.E.2d at 882-883); Wisconsin (*Dumer*, 233 N.W.2d at 377).

> State courts have been quick to accept [claims similar to those made by Kerrie and Joe] since *Roe v. Wade*, because it is not a significant departure from previous tort law. A case like this one is little different from an ordinary medical malpractice action. It involves [an alleged] failure by [health care providers] to meet a required standard of care, which [allegedly] resulted in specific damages to [Kerrie and Joe]. [Park Clinic and Scanson try] to separate this case from those of ordinary medical malpractice by raising political and moral questions concerning abortions, but the [United States] Supreme Court has already settled that issue. In *Roe v. Wade*, the [United States Supreme] Court held that it was the mother's constitutional right to decide during the first trimester of pregnancy whether to obtain an abortion. The [Defendant health care providers allegedly] deprived [Kerrie] of the opportunity to make [such] an informed decision . . . . Because of [the Defendant health care providers' alleged] negligence [in this regard], [Kerrie and Joe] are [presumably] faced with large expenses for [Baby Evans'] care and special treatment. As in any other tort case, the defendant must bear the burden for injuries resulting from its own negligence. "Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses, which, if born, would suffer from genetic (or other) defects."

Robak, 658 F.2d at 476 (internal citations omitted) (quoting *Berman*, 404 A.2d at 14); *Roe*, 410 U.S. at 164-165.

IT IS HEREBY ORDERED:

1. Park Clinic and Scanson's Motion to Dismiss is **DENIED**.

2. Kerrie and Joe's Objections to Park Clinic and Scanson's Reply Brief are **OVERRULED.**

Dated this 18th day of June, 2012.

Hon. Mike Salvagni
District Judge

c: E. Casey Magan / Russell S. Waddell
Julie A. Lichte
Lisa A. Speare
Robert C. Brown
John F. Sullivan